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1-129778
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IN THE MATTER OF:

Rene G. Cyr
Claimant

Against

Bath Iron Works Corporation
Employer/Self-Insurer

And

Commercial Union Companies
Liberty Mutual Insurance Co.
Carriers

APPEARANCES:

James W. Case, Esq.
For the Claimant

Stephen Hessert, Esq.
For the Employer/Self-Insurer

Kevin M. Gillis, Esq.
For the Liberty Mutual Insurance

(No Appearance by Agreement)
For Commercial Union Companies

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER ON REMAND - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 30, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for a Carrier's exhibit and EX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

This Administrative Law Judge, by **Decision and Order Denying Benefits** dated April 24, 2001, denied Claimant's claims for additional compensation and medical benefits – other than those already paid him by the Employer and its Carrier – primarily on the basis of the landmark decision of the U.S. Circuit Court for the First Circuit in **Bath Iron Works Corporation v. Director, OWCP (Acord),** 125 F.3d 18, 21, 31 BRBS 109, 111 (CRT) (1st Cir. 1997).

Claimant timely appealed from said decision and the Benefits Review Board, by **Decision and Order** dated May 14, 2002, reversed my conclusion "that the collateral estoppel doctrine bars Claimant's entitlement to benefits under the Act" and the Board remanded the case "for further consideration consistent with (its) opinion."

As the Board's decision is non-published and for ease of reference for the parties and, most important, reviewing authorities in the Circuit in whose jurisdiction this case arise, I shall insert the most pertinent parts of this decision (at pages 2-11) at this point:

"Claimant sustained several work-related injuries over the course of his employment for employer between February 18, 1974, and September 7, 1991. Specifically, claimant alleged that work-related injuries occurred on May 3, 1984 (back sprain), October 16, 1985 (cervical strain), August 4, 1986 (right knee injury), December 3, 1990 (cervical strain), and February 14, 1991 (left knee injury), that he stopped working as of September 7, 1991, due to the cumulative effect of his prior work-related injuries, and that his repetitive use of pneumatic tools caused carpal tunnel

syndrome in both wrists which arose on or about August 18, 1993.[1] As a result of the work-related back sprain of May 3, 1984, claimant missed several weeks of work for which employer's carrier, Liberty Mutual Insurance Company (Liberty Mutual, carrier), paid compensation. Claimant nevertheless returned to his usual employment as a tank tester in June 1984. Following the left knee injury on February 14, 1991, employer placed claimant on light duty bench work in March 1991, in compliance with Dr. Kalvoda's restrictions. Claimant thereafter underwent arthroscopic surgery on June 12, 1991, and returned to light duty bench work on July 15, 1991, with restrictions to avoid kneeling, squatting or climbing ladders or stairs. Employer paid claimant temporary total disability benefits from June 1991 until July 15, 1991 under the Maine Worker's Compensation Act. Emp. Ex. 4 at 15. Claimant continued to perform light duty work until September 7, 1991, at which time employer placed him out of work presumably because it had nothing available within claimant's medical restrictions.[2] He remained out of work until July 1999, at which time he was recalled by employer to work as a parking lot attendant for two hours a day, five days a week.

"Liberty Mutual again paid claimant workers' compensation benefits for the May 3, 1984, work-related injury commencing September 7, 1991, under the Maine Workers' Compensation Act, but subsequently sought review of the case by the State of Maine Workers' Compensation Board (the State Board). Emp. Ex. 4. At that proceeding, employer sought a determination regarding claimant's entitlement to compensation for the injury to his left knee on February 14, 1991. Following a hearing, the State Board concluded that claimant sustained a work-related back injury on May 3, 1984, while Liberty Mutual was the carrier on the risk, and a work-related left knee injury on February 14, 1991, while employer was self-insured,[3] and that claimant's then current lower back problems were not due to his 1984 work injury. The State Board found the self-insured employer liable for benefits for claimant's fifty percent partial incapacity as a result of his February 14, 1991, left knee injury and ordered employer to repay Liberty Mutual for

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[1]Claimant filed a claim under the Act for the May 3, 1984 injury on December 20, 1993. Cl. Ex. 24. Claimant filed claims for the other five discrete injuries on February 26, 1994. Cl. Exs. 25-28, 30. He also filed a claim for "multiple," unspecified injuries on February 26, 1994, alleging total disability commencing September 7, 1991. Cl. Ex. 29.

[2]With regard to the injuries sustained on October 16, 1985 (cervical strain), December 3, 1990 (cervical strain), and August 4, 1986 (right knee), claimant did not lose any time from work and continued to perform his usual work as a tank tester.

[3]The record establishes Liberty Mutual was the carrier on the risk for employer from March 1, 1981, through August 31, 1986, and that employer became self-insured as of September 1, 1988.

the benefits it paid claimant from September 7, 1991, through March 15, 1993, and to continue to pay such benefits to claimant after that date based on an average weekly wage of $510.63.

"Claimant also filed separate claims for each of his alleged injuries under the Longshore Act seeking compensation for permanent total disability beginning on September 7, 1991. Alternatively, claimant sought an award of permanent partial disability, alleging that his loss of wage-earning capacity is higher than that established by the State Board. In response, employer and carrier asserted, among other things, that the March 15, 1993, decision of the State Board is binding on the parties pursuant to the doctrines of res judicata, collateral estoppel and election of remedies, in light of the decision by the United States Court of Appeals for the First Circuit in **Bath Iron Works Corp. v. Director, OWCP [Acord]**.125 F.3d 18, 31 BRBS 109(CRT)(lst Cir. 1997).

"In his decision, the administrative law judge found that claimant sustained seven work-related injuries, that the claims therefore were timely filed, that claimant could not return to his usual employment as of September 14, 1991, and that employer did not establish the availability of suitable alternate employment until March 17, 2000. Accordingly, the administrative law judge found that claimant established entitlement to permanent total disability benefits. He concluded, however, pursuant to **Acord**, that claimant's claims under the Act must be denied due to the March 15, 1993, decision by the State Board.

"On appeal, claimant challenges the administrative law judge's finding that his claims under the Act must be denied by virtue of the decision by the State Board. Self-insured employer and Liberty Mutual respond, urging affirmance.

"Claimant asserts that the administrative law judge erroneously applied the collateral estoppel doctrine to bar his entitlement to benefits under the Act since, as in **Plourde v. Bath Iron Works Corp.**, 34 BRBS 45 (2000), his burden to establish entitlement to total disability in the state proceeding was greater than it is under the Act. Claimant also contends that the preclusive effect given to the state proceeding by the administrative law judge exceeded the limited scope of the State Board's decision. In particular, claimant avers that the state proceeding addressed only the issues as to whether there was a causal contribution of the May 3, 1984, back injury and February 14, 1991, left knee injury to claimant's incapacity and, if so, the extent of the resulting incapacity. Claimant thus argues that as the remaining claims for injuries were not addressed in the state proceeding, collateral estoppel cannot apply to those claims at the federal level.

"Collateral estoppel, or issue preclusion, is applied when: 1) the issue sought to be precluded is identical to one previously litigated; 2) the issue was actually determined in the prior proceeding; 3) the issue was a necessary part of the judgment in the prior proceeding; and 4) the prior judgment is final and valid. **See Penobscot Nation v. Georgia-Pacific Corp.**, 254 F.3d 317 (1st Cir. 2001), **cert. denied**, 122 S.Ct. 1064 (2002); **Plourde v. Bath Iron Works Corp.**, 34 BRBS 45 (2000); **see also** Restatement (Second) of Judgments §27. The point of collateral estoppel is that the first determination is binding not because it is right but because it is first, and was reached after a full and fair opportunity between the parties to litigate the issue. **Acord**, 125 F.3d at 22, 31 BRBS at 112(CRT). Collateral estoppel effect may be denied because of differences in the burden of proof in the two forums. **Acord**, 125 F.3d at 21, 31 BRBS at 11 1(CRT); **Plourde**, 34 BRBS 45. Relitigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first. **Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]**, 583 F.2d 1273, 1278, 8 BRBS 723, 732 (4th Cir.), **cert. denied** 440 U.S. 915 (1978), **citing** Restatement (Second) of Judgments, §68.1(D), (year) Comment F at 38-39; **see also Plourde**, 34 BRBS 45.

"In the instant case, the administrative law judge concluded that he was precluded by the State Board's decision from awarding benefits to claimant under the Act. After discussing **Acord**, the administrative law judge observed that claimant had a full hearing before the Maine Workers' Compensation Board in which both employer and carrier fully participated, and that the hearing officer, after a thorough review of essentially the same record as was presently before him, issued a detailed decision awarding claimant partial disability benefits. The administrative law judge added that while one federal claim, carpal tunnel syndrome, is dated after the date of the State Board's March 15, 1993, decision, that claim is based on the evidence, facts, and events presented to the State Board. The administrative law judge further observed that while the Board has attempted to distinguish **Acord**, in **Plourde**, he was nevertheless bound to follow the precedent of the United States Court of Appeals for the First Circuit.

"In the state forum, the State Board stated that employer filed a petition for review of incapacity and a certificate of suspension for the work-related injury sustained on February 14, 1991, and that Liberty Mutual petitioned for apportionment on account of the February 14, 1991, injury. Emp. Ex. 4 at 5. After a discussion of the relevant evidence, including brief references to the work-related injuries sustained on October 16, 1985, and August 5, 1986, the State Board concluded that claimant's work search

efforts were too narrow to establish entitlement to total incapacity benefits. The State Board nevertheless concluded that claimant is 50 percent incapacitated as a result of his February 14, 1991, left knee injury, and thus ordered employer to reimburse Liberty Mutual for the benefits it paid claimant, based on a 50 percent incapacity, from September 7, 1991, to March 15, 1993, and then to pay claimant, on a continuing basis thereafter.

"We reverse the administrative law judge's finding that the claims under the Act are barred by the doctrine of collateral estoppel. As discussed above, the State Board's decision addressed and resolved the issue of claimant's entitlement to benefits with regard to only two of his work-related injuries, **i.e.**, the back injury sustained on May 3, 1984, and the left knee injury sustained on February 14, 1991. The State Board did not consider many of the issues presented by claimant before the administrative law judge in his claims under the Act, **i.e.**, that claimant suffered work-related carpal tunnel syndrome that became manifest in 1993, and that claimant is totally disabled as a result of the cumulative effect of his work-related injuries including those sustained on October 16, 1985, August 5, 1986, and December 3, 1990. Thus, as collateral estoppel only applies to issues actually litigated and the issues in the two proceedings are not identical, it can not bar those claims or issues that were not addressed by the State Board. **See Figueroa v. Campbell Industries**, 45 F.3d 311 (9th Cir. 1995); **Formoso v. Tracor Marine, Inc.**, 29 BRBS 105 (1995); **Kollias v. D&G Marine Maintenance**, 22 BRBS 367 (1989), **rev'd on other grounds**, 29 F.3d 67,28 BRBS 70(CRT)(2d Cir. 1994), **cert. denied**, 513 U.S.1146 (1995).

"Furthermore, issue preclusion also is inapplicable to the disability issues in the two claims which were addressed by the State Board, as there are material differences in the burdens of proof. In **Plourde**, 34 BRBS 45, the Board reversed the administrative law judge's finding that collateral estoppel precludes claimant from litigating the issue of the extent of his disability under the Longshore Act after having brought a claim under Maine law, as the allocations of the burdens of production and proof differ materially under the two statutes. Specifically, the Board observed that employer's burden of establishing suitable alternate employment under the Longshore Act is greater than its burden of establishing claimant's ability to work under the state act,[4] and that claimant bore a higher burden of establishing his

[4]With regard to the issue of total disability, the employer's initial burden under the state act, that of coming forward with nothing more than medical evidence evincing an ability to work, is significantly lighter than that required under the Longshore Act, which requires employer to establish the availability of suitable alternate employment by providing evidence of realistically available positions, either at its facility or on the open market, that claimant can perform given his age, education, vocational background and physical restrictions. **CNA Ins. Co. V. Legrow**,

inability to perform any work under state law than that required under the Longshore Act.[5] The Board thus held that the issue of extent of disability is a mixed question of law and fact to which collateral estoppel effect is not given due to differing burdens of proof. **Plourde**, 34 BRBS at 47-49. In the instant case, the State Board determined that claimant was not entitled to total disability benefits based on the work-related injuries sustained on May 3, 1984, and February 14, 1991, because his "work search efforts have been too narrow." Emp. Ex. 4 at 15. Under the Longshore Act, claimant's initial burden involves establishing only his inability to perform his usual work; the burden then shifts to employer to establish suitable alternate employment. **See CNA Ins. Co. v. Legrow**, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). Because of the differing burdens, the finding of the State Board limiting claimant to an award for 50 percent incapacity cannot be subject to the doctrine of collateral estoppel.[6] **Plourde**, 34 BRBS at 49. Accordingly, because of the differing burdens of proof under the two acts, collateral estoppel effect is not due the decision of the State Board that claimant is not totally disabled. Thus, the administrative law judge's finding that collateral estoppel bars claimant's claims for benefits under the Act is reversed.[7] For the

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935 F.2d 430, 434, 24 BRBS 202, 208(CRT) (1St Cir. 1991); **see Plourde**, 34 BRBS at 48.

[5]Under Maine law, once employer establishes claimant's physical capacity to work, claimant must show that work is unavailable to him within his restrictions in order to retain total disability benefits or to obtain a larger partial disability award. Although a claimant under the Longshore Act bears a complementary burden of establishing reasonable diligence in attempting to secure alternate employment, **see CNA Ins. Co. v. Legrow**, 935 F.2d 430, 24 BRBS 202(CRT) (1St Cir. 1991); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986), **cert. denied**, 479 U.S. 826 (1986), this burden does not arise until employer has established the availability of suitable alternate employment. **See Plourde**, 34 BRBS at 48.

[6]For the reasons stated in **Plourde**, 34 BRBS at 48-49, we hold that the instant case is distinguishable from **Acord**. We note, however, that while the doctrine of collateral estoppel does not bar all benefits in these claims, it would apply to any findings of fact made by the state Board which are common to the claims filed under the Maine Act and the Longshore Act and which were fully litigated and necessary to the judgment in the prior proceeding. For instance, collateral estoppel would apply to the State Board's determination that claimant's complaints of low back pain are not related to his May 3, 1984, work injury as the ultimate burden of proof on causation under the state act and the Longshore Act is the same, i.e., claimant has the ultimate burden to establish causation. **See Acord**, 125 F.3d 18, 31 BRBS 109(CRT).

[7]We observe, moreover, that if applicable, collateral estoppel would not preclude claimant's entitlement to all disability benefits under the Act, as the administrative law judge found, but would require the administrative law judge to conclude that claimant's 1991 knee injury was

reasons expressed below, the case is remanded to the administrative law judge for further consideration.

"Carrier contends in its response brief that the administrative law judge's denial of claimant's claim can be affirmed on the alternative ground that the claims based upon the 1984, 1985, and 1986 injuries are, in contrast to the administrative law judge's determination, barred by Section 13, 33 U.S.C. §913.[8] As this argument supports the result below, we will address it, even though it is raised in a response brief. **Malcomb v. Island Creek Coal Co.**, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); **Hansen v. Director, OWCP**, 984 F.3d 364, 17 BLR 248(10th Cir. 1993); **Dalle Tezze v. Director, OWCP**, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); **see Farrell v. Norfolk Shipbuilding & Dry Dock Corp.**, 32 BRBS 283, **modifying in pert. part on recon.**, 32 BRBS 118 (1998); 20 C.F.R. §802.212(b). Section 13(a) of the Act provides that the right to compensation for disability under the Act is barred unless a claim is filed within one year of claimant's awareness of the relationship between his injury and his employment. The time limit in this provision is imposed in order to insure fairness to employers by preventing the revival of stale claims in cases in which evidence has been lost, memories have faded, and witnesses have disappeared. **See Belton v. Traynor**, 381 F.2d 82 (4th Cir. 1967). However, where an employer has voluntarily paid compensation, Section 13(a) provides that such payments toll the running of the statute of limitations. In such a case, the employer is fully aware of claimant's injured condition and the concern about stale claims is absent. **See generally Smith v. Universal Fabricators, Inc.**, 21 BRBS 83 (1988), **aff'd**, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), **cert. denied**, 493 U.S. 1070 (1990). The Board has specifically held that voluntary payments made by employer under a state workers' compensation act constitute payment of benefits under Section 13(a) so as to toll the one year statute of limitations. **Id.**; **see also Saylor v. Ingalls Shipbuilding, Inc.**, 9 BRBS 561 (1978)(Smith, S., dissenting).

"In the instant case, the claim for the back injury sustained on May 3, 1984, filed on December 20, 1993, Cl. Ex. 24, is timely as claimant filed his claim for this injury under the Act within one year of the last payment of compensation by carrier. **See, e.g., Smith**, 21 BRBS 83. Specifically, while carrier initially stopped paying benefits for the May 3, 1984, work injury on June 3, 1984, it voluntarily resumed the payment of state benefits for this

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partially disabling in accord with the State Board's finding.

[8]We note that carrier raised this issue before the administrative law judge. See 33 U.S.C. §913(b)(1). Its argument is focused on these particular dates of injuries as they occurred during the time that Liberty Mutual was the carrier on the risk.

injury on September 7, 1991, and continued to make such payments until the issuance of the State Board's decision on March 15, 1993. Claimant's claim for the May 3, 1984, injury was filed on December 20, 1993, within the one-year time limit. Carrier cites **Colburn v. General Dynamics Corp**., 21 BRBS 219(1988), for the proposition that voluntary payments made under the state act after the statutory period contained in Section 13 has expired do not revive the claim for statute of limitations purposes. In that case, the injury occurred on April 5, 1977, and payments were made until July 1979. Thus, the statute of limitations expired one year from that date. The claimant thereafter filed federal and state claims on October 22, 1980, and later received a lump sum payment pursuant to a state award on July 12, 1982. The Board held that the fact that claimant received state benefits almost two years after the federal claim was filed did not toll the time for filing. In so finding, the Board distinguished the case from **Smith**, 21 BRBS 83, and **Saylor**, 9 BRBS 561, as in those cases, like the one herein, the claim was filed while benefit payments were ongoing or within one year of the last payment. Moreover, we note that the subsequent state payment in **Colburn** was due to an award, and was not a voluntary payment. Carrier's contention is therefore rejected, and we hold that the claim for the May 3, 1984 back injury was timely filed.[9]

"Carrier's contentions, however, regarding the timeliness of the claims for the injuries sustained on October 16, 1985, and August 4, 1986, have merit. In addressing the issues presented by Sections 12 and 13, the administrative law judge did not separately discuss the distinct work-related injuries claimed by claimant but instead lumped all of them into one general finding. For instance, with regard to the injuries sustained on October 16, 1985, and August 4, 1986, the record establishes that claimant lost no time from work nor received any compensation, that employer did not receive notice of these injuries until December 27, 1993, and that claimant's claims for these injuries were not filed until February 26, 1994. Cl. Exs. 25. 26. The record also establishes that claimant stopped working as of September 7, 1991, HT at 12; Cl. Ex. 29; Emp. Ex. 1. With regard to the October 16, 1985 and August 4, 1986, injuries, carrier raised the timeliness of the notice of injury and the filing of these claims, yet with regard to Section 12 the administrative law judge stated only that "although employer did not receive written notice of the claimant's injury or

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[9]Employer did not argue before the administrative law judge that the claim related to the February 14, 1991, work injury was not timely filed. **See** 33 U.S.C. §91 3(b)(1). Thus, we need not address the issue of whether the filing of a state claim tolls the one-year filing requirement of Section 13(a), pursuant to Section 13(d), 33 U.S.C. §913(d), as the two federal claims that were the subject of state claims were filed pursuant to Section 13(a). **But see Bath Iron Works Corp. v. Director, OWCP [Acord]** 125 F.3d 18, 31 BRBS 1 09(CRT) (1St Cir. 1997); **Cf. Ingalls Shipbuilding Div. v. Hollinhead**, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978).

occupational illness as required by Sections 12(a) and (b), the claims are not barred because the employer had knowledge of the work-related problems or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice." Decision and Order at 17. Under Section 13, the administrative law judge concluded that all of the claims are timely as the state proceeding tolled the statute of limitations with regard to all seven of claimant's claims. As discussed above, however, the state proceeding involved only injuries sustained on May 5, 1984, and February 14, 1991, and thus if Section 13(d) were applicable, **see** n.9, **supra**, the tolling provision would affect only the claims filed in those matters.

"Thus, we must vacate the administrative law judge's finding that the notices of injury and claims associated with the injuries sustained on October 16, 1985, and August 4, 1986, are timely and remand for further consideration of this issue.[10] On remand, the administrative law judge must consider the timeliness of these claims in terms of the filing requirements of Sections 12 and 13.[11] He must determine claimant's date of awareness of the relationship between his injury and his employment, **see Paducah Marine Ways v. Thompson**, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); **Bath Iron Works Corp. v. Galen**, 605 F.2d 583, 10 BRBS 5863 (1st Cir. 1979), and determine the timeliness of the notices and claim with reference to this date, mindful of the fact that claimant is afforded a presumption pursuant to Section 20(b), 33 U.S.C. §920(b), that his notices and claims were timely filed. **See Shaller v. Cramp Shipbuilding &Dry Dock Co.**, 23 BRBS 140 (1989); **see also Nelson v. Stevens Shipping & Terminal Co.**, 25 BRBS 77 (1992) (Dolder, J., dissenting).

"Self-insured employer argues that if the Board holds that collateral estoppel is inapplicable to the case at hand, remand is in order as it proffered numerous arguments in addition to the legal issue concerning collateral estoppel, which were not specifically addressed by the administrative law judge. In support

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[10]The timeliness of the claim for bilateral carpal tunnel syndrome, filed on August 18, 1993, was not challenged below. **See** 33 U.S.C. §913(b)(1). Moreover, self-insured employer did not raise in its response a challenge to the timeliness of the claim for the December 3, 1990 cervical injury. Thus, we will not address this issue, as employer did not preserve any affirmative defense in this regard.

[11]In addition, self-insured employer raised below the validity of the claim filed with regard to the "multiple injuries" allegedly sustained on September 7, 1991, since, for among other reasons, it is unclear whether this is actually a separate claim or not. **See** Cl. Ex. 29. As employer suggests, there is no specific or gradual injury to any body part described, and the administrative law judge on remand should address employer's contentions regarding the nature of this claim.

of its assertion, employer notes that the administrative law judge wrote in his decision that "[i]n view of the foregoing [collateral estoppel ruling], all other issues are moot and need not be resolved at this time, pending further instructions from the Board or First Circuit." Decision and Order at 23. Despite this statement, the administrative law judge did, in fact, consider other issues relating to claimant's allegation that he is entitled to permanent total disability benefits. In this regard, he summarily determined that claimant's injuries are work-related as claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), and employer did not rebut the presumption. Claimant agrees that the case must be remanded for further findings regarding whether his disability is related to the work injuries. **See** Cl. Reply Brief at 4. Thus, we vacate the administrative law judge's summary finding that causation is established, and we remand for further findings on this issue. **See** 33 U.S.C. §920(a); **Bath Iron Works Corp. v. Director, OWCP [Harford]**, 137 F.3d 673, 32 BRBS 45(CRT)(1st Cir. 1998); **Bath Iron Works Corp. v. Director, OWCP [Shorette]**, 109 F.3d 53,31 BRBS 19(CRT)(1st Cir. 1997).

"Additionally, the administrative law judge concluded that claimant was totally disabled until March 17, 2000, the date of employer's Labor Market Survey, but due to his finding on the collateral estoppel issue, he did not specifically address claimant's entitlement to benefits in this case. As employer stated in its post-hearing brief, and as the administrative law judge stated in his decision, claimant returned to light-duty part-time work as a parking lot attendant for employer on July 21, 1999, and continued in that employment at least up until the time of the hearing. The administrative law judge, however, did not address whether this position constitutes suitable alternate employment, and thus, whether claimant was entitled to an award of only partial disability benefits from that time. **See Darby v. Ingalls Shipbuilding, Inc**., 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Furthermore, the administrative law judge did not discuss the significance, if any, of the fact that several of claimant's injuries, in particular the August 4, 1986, right knee injury, the February 14, 1991, left knee injury, and the August 18, 1993, bilateral carpal tunnel syndrome injury, are to scheduled members and thus the implications presented by **Potomac Electric Power Co. v. Director, OWCP [PEPCO]**, 449 U.S. 268, 14 BRBS 363 (1980).[12] Lastly, the administrative law judge did not resolve the pertinent responsible carrier issues relevant to the various injuries in this

[12]In **PEPCO**, 449 U.S. 268, 14 BRBS 363, the Supreme Court held that a claimant who is permanently partially disabled due to an injury to a member listed in the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), is limited to the recovery provided therein, and may not receive an award under Section 8(c)(21) for a loss in wage earning capacity. **See also Barker v. US. Dept. of Labor**, 138 F.3d 431, 32 BRBS 171(CRT)(1st Cir. 1998).

case.[13] **See generally Foundation Constructors, Inc. v. Director, OWCP**, 950 F.2d 621, 25 BRBS 71(CRT)(9th Cir. 1991); **Buchanan v. Int'l Transportation Services**, 33 BRBS 32 (1999), **aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.**, No. 99-70631 (9th Cir. Feb. 26, 2001).

"In summary, we reverse the administrative law judge's finding that collateral estoppel bars consideration of claimant's claims, and we vacate the denial of benefits. On remand, the administrative law judge must separately address the timeliness of the notices of injury and claims for compensation for the October 16, 1985, and August 4, 1986, injuries. He must fully address whether there is a causal relationship between each of claimant's injuries, the disability resulting therefrom, and the employment alleged as a cause in light of the Section 20(a) presumption, and render specific findings regarding the extent of claimant's disability from each injury. He also must determine which carrier, **i.e.**, self-insured employer and/or Liberty Mutual, is responsible for the payment of any benefits awarded.

"Accordingly, the administrative law judge's finding that the collateral estoppel doctrine bars claimant's entitlement to benefits under the Act is reversed. The denial of benefits is vacated, and the case is remanded for further consideration consistent with this opinion."

The record in the case was docketed at the Boston District on July 29, 2002 and this Administrative Law Judge, by **ORDER** dated July 31, 2002 (ALJ EX A), advised the parties of such docketing and gave the parties thirty (30) days to resolve the claims voluntarily and, failing that, an additional thirty (30) days to file briefs on the issues mandated by the Board for reconsideration. Claimant filed a status report on August 14, 2002. (CX A) Employer's counsel requested an extension of time for the parties to file their post-remand briefs (EX A) and the request was granted by **ORDER** issued on September 10, 2002. (ALJ EX B) Claimant's brief (CX B) was filed on August 16, 2002, Liberty Mutual's (RX A) brief was filed on September 11, 2002, and the Employer's brief (EX B) was filed on September 19, 2002, at which time the record was closed.

The Findings of Fact and Conclusions of Law made in my April 24, 2001 **Decision and Order Denying Benefits,** to the extent not disturbed by the Board, are binding upon the parties as the "Law of the Case," are incorporated herein by reference as if stated herein

[13]We note that either carrier or self-insured employer will be entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for all payments claimant received for the same injury or disability under the state law. **See D'Errico v. General Dynamics Corp.**, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993).

in extenso and will be reiterated herein for purposes of clarity and to deal with the Board's specific instructions and directions to me.

On the basis of the totality of this closed record and having reconsidered all of the evidence in light of the Board's mandate herein, I shall now make these:[14]

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS

As already noted above, this matter has been remanded, pursuant to a Decision of the Benefits Review Board, issued on May 24, 2002. Pending are claims for compensation based upon a number of dates of injury. Liberty Mutual covers dates of injury of May 3, 1984 (low back), October 16, 1985 (neck), and August 4, 1986 (right knee). The Claimant also is pursuing claims against Bath Iron Works, self-insured, based upon a claimed injury to both the left and right knees on February 14, 1991 as well as a subsequent injury of carpal tunnel syndrome, alleged to have occurred on August 18, 1993.

It has been the position of Liberty Mutual during this litigation that the claims against it should be denied, for various reasons. With respect to the May 3, 1984 low back injury, it is the position of Liberty Mutual that there are three reasons why the claim should be denied. The first argument was that the claim was barred by the one year statute of limitations provided by Section 13. The second argument was that a prior decision of the Maine Workers' Compensation Board, issued on March 15, 1993, containing a finding that the employee's low back complaints were not related to the 1984 injury, collaterally estops the claimant from obtaining a finding of causal relationship in the current litigation. The third argument was that the ongoing low back complaints have in fact not been causally related to the 1984 injury. With respect to the 1985 neck injury, Liberty Mutual's position is that the claim should be denied because any ongoing neck complaints are unrelated to the 1985 injury, and because the claim is barred by the one year statute of limitations under Section 13. With respect to the 1986 right knee injury, Liberty Mutual takes the position that the claim is barred by Section 13. Finally, Liberty Mutual takes the position that it is not the carrier responsible for the compensation claimed in any event, under the last injury rule.

As also noted above, my Decision and Order issued on April 24, 2001 denied all claims on the basis of issue preclusion arising

[14]In the interests of expediting this decision, as I shall shortly hang up the gavel, I shall be adopting certain parts of the parties' briefs. I have thoroughly considered all of the arguments and my adoption of certain arguments forecloses, **IPSO FACTO**, adoption of contrary arguments.

from the prior decision of the Maine Workers' Compensation Board. I also ruled that the claims were not barred by Section 13 because of the pendency of the prior state litigation. On appeal by the Claimant, the Benefits Review Board vacated my decision, holding that the decision of the Maine Workers' Compensation Board did not have the effect of completely barring all of the pending claims. The Board also addressed some of the remaining issues. With respect to the 1984 injury, at page 8 of the decision, it held that the claim based upon the injury was timely. However, in footnote 6, which begins on page 6, the Board ruled that the doctrine of collateral estoppel does apply to the State Board's determination that the claimant's low back complaints are not related to the May 3, 1984 injury, because the claimant had no greater burden of proof under the state statute than under the Longshore act. The issue of whether there in fact is a causal relationship between the 1984 injury and the ongoing low back complaints has not been addressed by a decision in this proceeding to date, and was not addressed by the Benefits Review Board, as the ruling on the issue of collateral estoppel as it pertains to the 1984 date of injury is dispositive. With respect to the issue of whether the claims based upon the 1985 and 1986 dates of injury are barred under Section 13, the Board vacated the prior ruling that the claims are not barred, and remanded the statute of limitations issue relating to those dates of injury for further consideration. The remaining issues were not addressed by the Benefits Review Board, according to Liberty Mutual.

With reference to the issue of Collateral Estoppel, although the Benefits Review Board ruled that the prior decision of the Maine Workers Compensation Board did not completely bar all claims that are pending, the Board made it clear that the prior state decision did preclude a finding in this litigation that the ongoing low back complaints are causally related to the 1984 injury, because it had previously been determined in the state litigation that there was no causal relationship. The procedural situation in this case is identical to the situation reviewed by the U.S. Court of Appeals in **Bath Iron Works Corporation v. Director, Office of Workers' Compensation Programs (Acord)**, 125 F.2d 18, 31 BRBS 109 (CRT) (1st Cir. 1997). In both cases, this employer, with the ultimate burden of proving that the ongoing disability was unrelated to the work injury, filed a Petition for Review under the Maine Workers' Compensation Act, and was successful in obtaining a finding of no ongoing causal relationship. In both cases, the Claimant subsequently sought benefits under the Longshore Act, attempting to obtain a finding inconsistent with the finding of the Maine Workers' Compensation Board. The Benefits Review Board, in its decision in this case, clearly and correctly rules, at footnote 6 of its decision, that the doctrine of collateral estoppel applies to the prior state determination regarding medical causation as it pertains to the 1984 injury. This issue is dispositive of the claim based upon the 1984 date of injury, and that claim must

therefore be denied on remand, according to Liberty Mutual.

With reference to the issue of medical causation, it remains the position of Liberty Mutual that claims based upon the 1984 and 1985 dates of injury should also be denied, because the effects of those injuries have ended, and there is no ongoing causal relationship between those injuries and the Claimant's symptoms, Liberty Mutual positing that the 1984 injury was likely a temporary aggravation of a longstanding degenerative condition in Claimant's low back. As mentioned above, it is not necessary to reach the factual issue of whether there is an ongoing causal relationship between that injury and the Claimant's ongoing low back complaints, as the Benefits Review Board has correctly ruled that, as a matter of law, the doctrine of collateral estoppel, based upon the prior State determination on that issue, mandates a ruling at this time that there is no causal relationship. However, if it is determined that a finding of fact on that issue is necessary, Liberty submits, as a matter of medical fact, that there is no causal relationship.

With respect to the 1985 date of injury, which involved an incident when Claimant was struck in the head while wearing a helmet, sustaining a neck strain, Liberty posits that there is no causal relationship between any continuing symptoms in Claimant's neck and that incident. As Dr. Brigham testified, that incident was obviously a minor neck strain which resolved shortly after it occurred. Therefore, any claim for benefits based upon the 1985 date of injury should be denied because of the lack of medical causation, according to Liberty.

Liberty Mutual further posits that all claims it covers are barred by the statute of limitations found in Section 13. With respect to the 1984 date of injury, I note that the Benefits Review Board has ruled that the claim is not barred. As that is the "Law of the Case," this Administrative Law Judge may not modify that ruling on remand. However, the issue is preserved for further appeal. As mentioned above, because application of the doctrine of collateral estoppel to the 1984 claim requires denial of that claim at this time, the statute of limitations issue is moot at this time in any event, pending further instructions from the First Circuit.

With respect to the 1985 date of injury, the Benefits Review Board has remanded the issue of statute of limitations for further consideration. The Board ruled that the prior state proceedings, which did not pertain to the 1985 or 1986 dates of injury, would not operate to toll the one year statute of limitations with respect to claims for those dates of injury. It also ruled that, on remand, the Administrative Law Judge is to consider when the Claimant became aware of the relationship between his injury and his employment, in determining whether the current claim is barred by the one year statute of limitations. The evidence establishes that Claimant lost no time from work following the October 16, 1985 date of injury. There would be no question about the fact that he

knew that he received an injury at work, related to his work, as he obviously was struck on the head. The payment records of Liberty Mutual show that no compensation was ever paid to him for this injury. The Claim for Compensation was filed on February 26, 1994. The one year statute of limitations would have expired on October 16, 1986. The tolling provision contained in Section 30 does not apply, as the employer was not required to file a First Report of Injury, as there was no lost time from work. Therefore, any claim for compensation based upon the 1985 injury is barred by Section 13. It should also be noted that the statute of limitations issue, as it pertains to the 1985 injury, is probably moot, because the effects of the 1985 injury ended long ago in any event, according to Liberty Mutual's essential thesis.

With respect to the August 4, 1986 right knee injury, the evidence again shows that the injury caused no lost time from work. The work-relatedness of the injury again was obvious, as the Bath Iron Works medical department records at the time reflect that Claimant complained of right knee pain, indicating that the pain had been precipitated by crawling around in tanks. He was obviously aware that the condition was work-related. Again, the tolling provision of Section 30 does not apply, because the Employer was not required to file a First Report of Injury. The Claim for Compensation was filed on February 26, 1994, long after the statute of limitations expired one year after the date of injury, on August 4, 1987. Therefore, the Claim for Compensation Based upon the 1986 injury is barred by the Statute of Limitations, according to Liberty.

As an alternate argument, Liberty submits that even if it is assumed that one of the injuries covered by Liberty Mutual remains causative in terms of disability and that the claim for compensation based upon such an injury is not barred by the statute of limitations, Liberty Mutual is nevertheless not responsible for Claimant's claimed compensation. In cases involving successive traumatic injuries, the employer and carrier responsible are the entities covering the most recent injury which aggravates, accelerates, or combines with any prior injuries to result in disability. **Kelaita v Triple A Machine Shop**, 17 BRBS 10 (1984). **See also Foundation Constructors v. Director, Office of Workers' Compensation Programs**, 950 F. 2nd 921, 25 BRBS 21 (CRT) (9th Cir. 1991). In this case, as found by the main Workers' Compensation Board previously, the February 14, 1991 left knee injury, covered by the employer, self-insured, clearly contributes to the Claimant's disability since he stopped working on September 7, 1991. Therefore, the employer, in its self-insured capacity, is responsible to the extent that any disability benefits are awarded, according to Liberty Mutual.

With reference to the nature and extent of Claimant's disability, Liberty further submits that if it is found that

Claimant is entitled to an award of permanent total disability benefits, Liberty would not be responsible for those benefits. In addition, there would be no liability for permanent partial disability benefits based upon the 1984 and 1985 injuries. If it is ruled that the claim based upon the 1986 date of injury is not barred by the statute of limitations, the potential liability would be for a scheduled award for permanent impairment to the right leg, which leaves as an issue the extent of that permanent impairment. Dr. Brigham, one of the foremost national experts on the assessment of permanent impairment under the **American Medical Association Guides**, has assessed a five (5%) percent permanent impairment to the leg, and in the event that a scheduled award is made, Liberty proposes that the award be based upon that assessment.

The record reflects that Claimant received one hundred (100%) percent compensation benefits from September 7, 1991 to March 15, 1993, and fifty (50%) percent benefits from that point to the present. The Employer or Carrier is to be credited with those payments against any award in this case under Section 3 (e) of the Act.

As this Judge reads the Board's decision, it sets forth the following issues: (1) the timeliness of the notice of injury with respect to the October 16, 1985 and the August 4, 1986 injuries; (2) the timeliness of the claims for compensation for the October 16, 1985 and the August 4, 1986 injuries; (3) the causal relationship between each injury and Claimant's disability; (4) the extent of Claimant's disability resulting from each injury; and (5) the responsible carrier. In addition, the Board has directed this Administrative Law Judge to consider whether the alleged injury on September 7, 1991 "is actually a separate claim or not." (BRB at 9, n. 11). This decision will address the September 7, 1991 injury initially, as this may dispose of the entire case, and then the numbered issues seriatim.

The Claim Alleging a September 7, 1991 Injury

In Claimant's post-hearing brief, dated March 29, 2001, at page 13, Claimant now concedes that he did not suffer a separate or discrete injury on September 7, 1991. Rather, a claim was made for that date "because it is the date that he went out of work when BIW found that they could no longer accommodate his limitations." **Id**. In order to establish a **prima facie** case, the Claimant has the burden of proving the existence of an injury. **Volpe v. Northeast Marine Terminals**, 14 BRBS 17, 20 (1981). "Injury" has been variously defined. In **Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968), the Court defined injury as occurring when "something unexpectedly goes wrong within the human frame." Claimant cannot point to a specific occurrence on September 7, 1991 affecting his body. Rather, on that date, Bath Iron Works put him out of work because of the multiplicity of restrictions resulting from previous

work and non-work injuries. Therefore, Claimant now withdraws his claim that an injury occurred on September 7, 1991.

THE NUMBERED ISSUES

I. Timeliness of Notice

Claimant submits that the Board mistakenly assumed that this ALJ, in his initial decision, did not address the timeliness of notice with regard to the October 16, 1985 and August 4, 1986 injuries. The Board noted that "carrier's contentions, however, regarding the timeliness of the claims for the injuries sustained on October 16, 1985 and August 4, 1986 have merit." BRB at 8. It then went on to discuss, in a global fashion, the timeliness issue and ended up lumping together timeliness of notice and timeliness of claim. In fact, as regards the October 16, 1985 and August 4, 1986 injuries, timeliness of notice was never an issue. At the hearing, the parties stipulated that notice was timely provided. **See** ALJ Decision and Order, April 26, 2001, at p. 2 ("The parties stipulate, and I find: (4) Claimant gave the Employer notice of the injuries in a timely manner."). Moreover, neither in its post-hearing brief nor in its brief to the Benefits Review Board did Liberty Mutual raise the issue of notice. Only in its post-hearing memorandum did Liberty raise the issues of statute of limitations, medical causation, responsible carrier, and nature and extent of disability. **See** Liberty's post-hearing brief dated March 30, 2001. In its brief to the Board, Liberty raised the identical issues, highlighting the issue of collateral estoppel.

Admittedly, this ALJ in his Decision and Order did discuss "Timely Notice of Injury" at pages 16 and 17, only out of an abundance of caution in view of the passage of time, in light of the stipulation of the parties and the fact that timeliness of notice was not raised as an issue. In any event, the ALJ concluded that even though the Employer did not receive written notice of Claimant's injuries, the claims were not barred because the Employer had actual knowledge of said injuries or because the Employer offered no persuasive evidence to establish that it was prejudiced by the lack of written notice. **Id**. at 17. In my judgment, therefore, the timeliness of notice is not an issue on remand as the parties' stipulation thereto is corroborated by this closed record, and I so find and conclude.

II. Timeliness of Claims

A. Date of Injury October 16, 1985

As to the filing of claims, Section 913(a) provides:

"Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred

unless a claim therefore (sic) is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment."

U.S.C. §913. As the Board pointed out, a "[c]laimant is afforded a presumption pursuant to Section 20(b), 33 U.S.C. §920(b), that his notices and claims were timely filed." BRB at 9, 10, **citing Shaller v. Cramp Shipbuilding & Drydock Co**., 23 BRBS 140 (1989); **Nelson v. Stevens Shipping & Terminal Co**., 25 BRBS 77 (1992) (Dolder, J., dissenting).

As regards the October 16, 1985 injury, Claimant filed his claim for benefits on February 26, 1994. Accordingly, the Employer bears the burden of establishing that Claimant had an obligation to file his claim more than a year prior to February 26, 1994. The Employer has failed to discharge that burden for the following reasons.

On October 16, 1985, Claimant "struck [his] hardhat on a cable tube causing pain in [his] neck, and upper back and severe headaches." (CX 25 at 314-321). That same day, he was treated at the Employer's Medical Department and was diagnosed as suffering a cervical strain. (CX 19 at Treatment Note dated October 16, 1985). He subsequently treated for this injury with chiropractor Reeder. (CX 12 at 145). Although he lost no time from work and continued his regular duties, Claimant testified that after that injury, he had a significant increase in his prior neck problems. (TR at 49-50).

Pursuant to 33 U.S.C. §930(f), the one-year statute of limitations under Section 913(a) is tolled when the carrier has knowledge of an injury and fails to file a report thereof as required by Section 930(a). In the instant case, the Employer did not file a Report of Injury until December 27, 1993 (CX 25 at 315), notwithstanding its knowledge of this injury (CX 19 at 218). The Employer's failure to file timely a Report of Injury tolled the statute of limitations, and thus, Claimant's claim was timely filed, and I so find and conclude.

Moreover, it is axiomatic the one-year limitations period under Section 913(a) does not begin to run until Claimant knows or should know that his injury is likely to impair his earning capacity. **Newport News Shipbuilding & Drydock Co. v. Parker**, 935 F.2d at 20, 24 BRBS 98 (4th Cir. 1991). An employee cannot become

"aware" of an injury for purposes of Section 13 until he/she sustains an impairment in earning capacity. **See Nelson v. Stevens Shipbuilding & Terminal Co**., 25 BRBS 277, 284 (1992) (Dolder, J., dissenting). In the instant case, the Claimant did not lose time from work until September 7, 1991. The Employer bears the burden of demonstrating that the Claimant had an awareness that his earning incapacity beginning on September 7, 1991 was related to the October 16, 1985 work injury. There is absolutely no evidence to support that inference. The record reflects that the incapacity beginning on September 7, 1991 was, by decree of the Workers' Compensation Board (EX 4), attributed to the 1984 injury and to the February 1991 left leg injury. The date of that decree is March 15, 1993. The Claimant filed his claim within a year of the issuance of the Maine Workers' Compensation Board decree. There simply is no evidence that he gained an awareness of the causal relationship between his incapacity and his 1985 work injury earlier than that date, and I find and conclude.

In view of the foregoing, I now find and conclude that the claim for the October 16, 1985 injury is timely.

B. Date of Injury August 4, 1986

On August 4, 1986, Claimant injured his right knee in a shipyard accident. Two days later, he reported to the First Aid Department: "Monday I was coming out of a tank and hit my right knee just right." (CX 19 at 228). The medical personnel noted "[r]ecurrent infrapatellar pain and soreness due to pressure and/or banging with crawling around in tanks." **Id**. at 229. Dr. Caven assessed "Continued subacute inflammation exquisitely tender area easily set off with recontusion injuries." **Id**. He imposed permanent restrictions against kneeling or crawling on the right knee. **Id**. Despite this knowledge of the Claimant's work injury, the Employer failed to file a Report of Injury until December 27, 1993. (CX 25 at 322). He lost no time from work as a result of this injury until September 7, 1991 when he was placed out of work by the Employer because of its inability to provide suitable work within his restrictions.

As was the case with regards to the October 16, 1985 claim, the August 4, 1986 claim is timely because of the operation of the tolling provisions of Section 930(f) and because the Employer has failed to discharge its burden of demonstrating that Claimant had an awareness that his incapacity dating from September 7, 1991 was causally related to the August 4, 1986 right knee injury. The same arguments apply to the 1986 injury and will not be repeated. Thus, I now find and conclude that the August 4, 1986 claim was timely filed.

III. Causation

This closed record leads to the conclusion that Claimant injured multiple body parts in the course of his maritime employment at the shipyard and that these injuries, as alleged (except for the now withdrawn September 7, 1991 injury), arose out of and in the course of Claimant's employment. These issues are not at issue on remand because this issue was conclusively established by this Administrative Law Judge in his Decision and Order at page 16. Rather, the issue that the Board has remanded to this Administrative Law Judge is whether each of the undisputed work injuries contributes to Claimant's disability. The extent of that disability, at least between September 7, 1991 and March 17, 2000 is also not at issue. I also previously found and concluded "[t]hat Claimant has established that he cannot return to work as a tank tester or as a shipfitter" and further found that "Claimant has a total disability until March 17, 2000." Decision and Order at 20. The March 17, 2000 date is the date that the Employer made an attempt to discharge its burden of demonstrating the existence of suitable and alternate employment in Claimant's competitive labor market. The Board did not complete its analysis of the issue of extent of incapacity because of its finding on collateral estoppel. I reiterate my prior conclusion that Claimant has established entitlement to total disability benefits and his entitlement to further benefits beyond March 17, 2000, their nature and extent, remain to be determined. The issue to be determined on remand, and the Responsible Party, however, is whether each injury contributes to Claimant's incapacity from March 17, 2000, however the nature and extent of that incapacity is ultimately determined and/or apportioned. The contribution of each injury will be discussed chronologically.

1. May 3, 1984

As already noted above, on May 3, 1984, Claimant suffered a work injury when he was struck from behind by a steel container being moved by a forklift. He was treated at Maine Medical Center's Emergency Department for back pain in the lower thoracic area. He was diagnosed as having sustained a dorsal back sprain. Two days later, Claimant began to treat with chiropractor Odiorne for pain in his neck, middle back and lower back and for headaches. (EX 4 at Findings of Fact 7 and 8). The hearing officer in the State worker's compensation proceeding noted:

> [H]e told the chiropractor that his pain was initially only in his lower back, but that he developed pain and stiffness in his neck, with numbness down his right arm and in his right thigh area, and headaches within the next couple of days. Dr. Odiorne diagnosed the Employee as having an acute subluxation syndrome, Grade III, of C4, with headache and bilateral "cervicalgia".

Id. Claimant received State worker's compensation benefits for this injury from Liberty Mutual from May 4, 1984 through June 3, 1984. He then returned to his pre-injury job as a tank tester in June 1984. On May 10, 1989, he began to treat with chiropractor Mogan for primary complaints of pain in his neck and upper back which Dr. Mogan attributed to the work injury of May 3, 1984. (CX 12 at 146).

Dr. Phillips, in his November 24, 2000 report, documents the extensive treatment Claimant has received for complaints of neck pain. At page 13 of that report, he assesses "chronic cervical radiculopathy on the right and on examination today had weakness involving the C6-7 nerve roots. This is due to work-related injury at Bath Iron Works in 1984." (Dr. Phillips' report is Exhibit 3 of the deposition of Dr. Brigham). At page 14 of his report, Dr. Phillips recommends, "He essentially has no work capacity. For his neck problems, he needs work restrictions, nothing overhead, no reaching, pushing, pulling, no lifting over 10 pounds."

For his part, Dr. Brigham states: "The May 3, 1984 injury also was the predominant cause of his cervical difficulties." (EX 58 at 406-407). In describing the Claimant's "neck pain – cervicothoracic", Dr. Brigham states:

> The next most significant problem is his cervicothoracic pain. This is far less disabling than his back pain. Historically, the origin would be the May 3, 1984 injury, with an aggravation by a December 3, 1990 injury. He has had evidence of guarding, however has not any evidence of radiculopathy. Subjectively, the 1990 injury increased the severity of pain, per his report. However, there is no evidence that there was any structural change.

(EX 58 at 406). As far as work capacity, he states: "In terms of his neck, he should avoid static neck positioning and frequent movements of his neck." **Id**. at 410.

The Employer bears the burden of demonstrating that the work restrictions imposed by Dr. Phillips and Dr. Brigham relating to the cervical spine are unrelated to the work injury of May 1984. Understandably, and I agree completely with this position, the Employer and its Carrier again raise collateral estoppel as a defense to this claim. The extent of the collateral estoppel bar as it relates to the 1984 injury was set forth by the Board: "[F]or instance, collateral estoppel would apply to the State Board's determination that Claimant's complaints of low back pain are not related to his May 3, 1984 work injury." (BRB at 6). The State Board decree made no findings relative to the Claimant's neck symptoms resulting from the May 3, 1984 injury. Therefore, collateral estoppel does not apply, and I now find and conclude. On the basis of the limitations imposed by both Dr. Phillips and

Dr. Brigham, Claimant is unable to return to his pre-injury job as a tank tester. On the basis of this evidence, I now find and conclude that the causal relationship between Claimant's May 1984 cervical spine injury and his disability is established.

2. Date of Injury October 16, 1985

The nature and scope of Claimant's October 16, 1985 injury to his head and neck are detailed above. It was the burden of the Employer and Carrier to demonstrate that this neck and cervical spine injury is unrelated to his incapacity subsequent to September 7, 1991. This it has failed to do. The Employer relies on the report of Dr. Brigham (EX 58) in an attempt to discharge its burden of proof. At pages 383 and 384 of that exhibit, Dr. Brigham sets forth the medical treatment that Claimant has received for his "Neck". Included therein is the treatment Claimant received at BIW's yard infirmary for a "date of accident" of October 16, 1985. He also includes the treatment provided by Dr. Marcotte in 1989 but ignores the contemporaneous treatment provided by Dr. Reeder, D.C. (CX 19). As regards this injury, Dr. Brigham's only comment is, "In terms of other events, he has had various exacerbations, however one event appears to be particularly problematic." He goes on to discuss the December 3, 1990 injury. (EX 58 at 392). Regarding causation, he states, "The October 16, 1985 injury ... does not appear to be of ongoing significance, rather reflective of an exacerbation." **Id**. at 407.

Claimant submits that this rather laconic observation is insufficient as a matter of law to discharge the Employer's burden of proof. In his deposition (p. 86), Dr. Brigham states that the effects of the October 1985 injury have ended. However, in his report, Dr. Brigham attributed all of the Claimant's cervicothoracic difficulty to the May 3, 1984 injury. But then, he flip-flopped on his opinion regarding the 1984 injury. Thus, we are left with Claimant having a history of neck and upper back complaints dating from either 1984 or 1985 with no explanation from Dr. Brigham as to the cause of those complaints. Clearly, this self-contradictory evidence fails to rebut the statutory presumption of causation and I so find and conclude.

Therefore, in view of the foregoing, I now find and conclude that the statutory presumption has not been rebutted and that a causal connection between the 1985 injury and Claimant's incapacity subsequent to September 7, 1991 has clearly been established.

3. Date of Injury August 4, 1986

The nature and scope of this injury have already been detailed above. As a result of the 1986 right knee injury, the Employer accepted and imposed permanent restrictions against kneeling and crawling. (CX 19 at 229). In his November 24, 2000 report, Dr.

Phillips attributes Claimant's right knee complaints to the work injury in 1986. Similarly, even Dr. Brigham (EX 58 at 407) states, "In terms of his knee pain, the problems with the right knee would be attributed to the August 4, 1986 injury..." Liberty Mutual has failed to rebut this compelling evidence of continuing causation, and I so find and conclude.

4. Date of Injury December 3, 1990

On December 3, 1990, Claimant again suffered an injury to his neck when he struck his head on an overhead pipe jamming his neck. (TR at 52) He was treated at the Employer's Health Department and diagnosed with a cervical neck strain. (CX 19 at 252). On the same day, he began treating with chiropractor Cyr for the injury. (CX 5 at 47). As regards causation, again the Employer rests its case on the report of Dr. Brigham. He states:

> On December 3, 1990, [Claimant] struck his head (while wearing a hardhat) when working in the engine room. He was seen that day be (sic) Employee Health and was felt to have a neck strain. Mr. Cyr feels that this worsened his neck for a long period of time, and the severity of the pain never decreased to the level that it was prior to the injury of December 3, 1990. The same type of pain was present, however the severity was forever worse following that injury of December 3, 1990.

(EX 58 at 392, 393). As regards causation, Dr. Brigham states:

> The December 3, 1990 injury, per his report, **would suggest an aggravation**, although this is not supported by the medical records. He was treated only for a short period of time, and there is no suggestion in the records that there was actually a permanent aggravation. This injury would not have changed his impairment, **e.g**. on the basis of guarding, in the use of the Injury Model, there would have been a 5% whole person permanent impairment secondary to the 1984 injury that would not have been altered by the December 3, 1990 injury. Therefore, it is my conclusion that this injury represented a temporary exacerbation. (Emphasis added)

(EX 58 at 407). Dr. Brigham's opinion is based on the mistaken assumption that, "[H]e was treated only for a short period of time, and there is no suggestion in the records that there was actually a permanent aggravation." (EX 58 at 407). This clearly is contradicted by the records of the chiropractor who treated Claimant for almost six years for cervical problems following the December 3, 1990 injury. (CX 5). Moreover, Dr. Brigham's conclusion rests upon the unwarranted belief that unless there is an increase in whole person permanent impairment, there can be no

ongoing contribution of the work injury to incapacity, a proposition not supported by any case law cited herein. Finally, Dr. Brigham, in formulating his opinion, chooses to ignore Claimant's subjective reports. For instance, he states, "Subjectively, the 1990 injury increased the severity of pain, per his report, **however there is no evidence that there was any significant structural change.**" (EX 58 at 406) (emphasis added). Similarly, he states, "The December 3, 1990 injury...per his report, **would suggest an aggravation**, although this is not supported by the medical records." (EX 58 at 407) (emphasis added). Dr. Brigham gives no basis for disregarding Claimant's subjective complaints. Therefore, his causation opinion omits an essential element of the patient's history without a valid reason. For all the above reasons, I now find and conclude that Dr. Brigham's opinion is unreliable and, as a matter of law, insufficient to rebut the statutory presumption of causation as regards the December 3, 1990 injury.

5. Date of Injury February 14, 1991

By operation of the doctrine of Collateral Estoppel, the causal relationship between Claimant's injury and his disability is conclusively established by virtue of the decree of the State Workers' Compensation Board. **See** BRB p. 7, n. 7 ("We observe, moreover, that if applicable, Collateral Estoppel would not preclude Claimant's entitlement to all benefits under the Act, as the administrative law judge found, but would require the administrative law judge to conclude that Claimant's 1991 knee injury was partially disabling in accord with the State Board's finding.").

6. Date of Injury August 18, 1993

Claimant testified that while he was still working, he noticed tingling in both hands when using impact wrenches or other vibratory tools, that he used vibration-producing pneumatic devices daily in his work and that, as a tank tester, he was required to crawl on his hands and knees throughout the day. The tingling in his hands continued after he left BIW in September 1991. (TR 55)

At pages 13 and 14 of his November 24, 2000 report, Dr. Phillips states:

> Bilateral carpal tunnel syndrome, right side moderate, left side mild. This required right hand carpal tunnel release, however, the symptoms persist. Bilateral carpal tunnel syndrome is due to kneeling and crawling while in tanks which requires one to be on one's hands and knees.

(Brigham deposition, Exhibit 3). Dr. Phillips restricts Claimant, because of his bilateral carpal tunnel syndrome, from using

vibratory tools, exposure to extreme temperatures, and would limit the use of his hands to 15 to 20 minutes per hour for writing, keying, fine manipulation, lifting, or carrying. **Id**. at 14. Clearly, on the basis of these restrictions, Claimant cannot return to his regular employment, as I have previously found and concluded.

Similarly, Dr. Brigham opines: "The problems he has had with the carpal tunnel syndrome, in the past, would be attributed to the August 18, 1993 injury." (EX 58 at 408). With regard to work capacity, Dr. Brigham assesses: "[I]n terms of his history of carpal tunnel syndrome, the only significant restriction I would impose at this time is no use of pneumatic tools." **Id**. at 410. Based on this minimal restriction Claimant would be unable to return to his usual work as a tank tester, and I again find and conclude.

All of the evidence supports the causal connection between Claimant's carpal tunnel injury and his disability. The Employer has failed to discharge its burden of disproving causation, and I so find and conclude.

IV. Extent of Incapacity Resulting From Each Injury.

The Board has directed this Administrative Law Judge to consider on remand the implications of the fact that some of Claimant's injuries are to scheduled members and some are not. Specifically, the 1984, 1985 and 1990 injuries are not scheduled injuries. The Supreme Court has held in **Potomac Electric Power Company v. Director, OWCP**, 449 U.S. 268, 14 BRBS 363 (1980) **[PEPCO]** that in cases where Claimant establishes permanent total disability, the schedule provisions set forth in Section 8(c) are inapplicable. Therefore, it is incumbent upon Claimant to establish permanent total disability and thereby render the schedules moot.

As noted above, I have already determined that Claimant cannot return to his work as a tank tester or as a shipfitter (**Decision and Order** at page 20) and that the Employer has failed to discharge its burden to demonstrate the existence of suitable alternate employment in the area between September 7, 1991 and March 17, 2000. **Id**. Based on these findings Claimant is entitled to an award of total disability benefits for that closed period of time. It needs to be pointed out that the Board erroneously faulted this Administrative Law Judge for failing to address whether the parking lot attendant position to which Claimant returned to work for Employer on July 21, 1999 constitutes suitable alternate employment. (BRB at 10.) In fact, it is implicit in my finding that "Claimant has a total disability until March 17, 2000..." that the parking lot attendant position is not suitable alternate employment. Otherwise I would not have awarded total disability

for a period of time when Claimant had returned to work as a parking lot attendant (between July 21, 1999 and March 17, 2000). In any event, I now explicate what was implicit in my earlier decision, namely that the parking lot attendant position is not suitable alternate employment. It is simply a make-work job and constitutes, at the very least, sheltered employment. The Employer has numerous jobs at its shipyard that are part of its light duty program, and one of these should have been made available to Claimant, in my judgment, long ago.

I do concede that my determination of extent of incapacity was truncated by the collateral estoppel issue. The issue remaining is the nature and extent of incapacity subsequent to March 17, 2000. That is the date that Arthur M. Stevens, Jr., the Employer's vocational consultant produced his labor market survey, which I, in dicta, characterized as "thorough and well-organized". (**Decision and Order** at page 20.) However, I did not conclude that this labor market survey was sufficient to discharge the Employer's burden to demonstrate the existence of suitable alternate employment in the area as that issue was moot at that time. Claimant claims total disability based on the combined effects of his pre-existing low back condition dating from the 1978 non-work related injury and the combined effects of all of the work injuries alleged herein. **See Fortier v. General Dynamics Corporation**, 15 ERRS 4 (1982). In order to establish a **prima facie** case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. **American Stevedores, Inc. v. Salzano**, 538 Fed. 2.nd 933, 4 BRBS 195 (Second Circuit 1976). In this case, Dr. Phillips opines that the Claimant has no work capacity and Dr. Brigham opines that claimant has, at best, between a sedentary and light work capacity. Neither assessment would permit claimant to return to his regular employment. Indeed, based simply upon restrictions relating to his bilateral knees and his low back, BIW put him out of work.

Once Claimant has met his burden of establishing a **prima facie** case of total disability, the Employer must establish the existence of realistically available job opportunities within his geographical area where employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions and which he could secure if he diligently tried. **See American Stevedores, Inc. supra; Air America Inc. v. Director OWCP**, 597 F2d. 773, 10 BRBS 505 (4th Cir. 1979) (Holding that the severity of the employer's burden must reflect the reality of the situation). In this case, the Employer has sought to demonstrate suitable alternate employment by hiring Claimant to work as a parking lot attendant two hours a day, ten hours per week. In another matter, **Scott D. Campbell v. Bath Iron Works Corporation, OWCP** No. 1-136820, this Employer similarly attempted to discharge its burden by offering Mr. Campbell the same parking lot attendant job in June 1999. At page 38 of my Decision in that

matter, I stated:

> ...I would also find and conclude that the job of parking lot attendant, two hours per day, five days per week (a schedule Claimant has often failed to keep because of his chronic lumbar pain) is "make work" or "sheltered employment". In this regard, I agree completely with my distinguished colleague District Court Judge Robert D. Kaplan, as he also found that same job to be "make work".

In this case, the Employer sought through the testimony of Daniel Cote to show that the parking lot attendant position is not "make work". That testimony did not help the Employer's case. He testified that when Claimant does not come in to work, he does not fill that position. (TR at 21) Importantly, he has no parking lot attendants for the third shift although he admitted that third shift parking is the perennial problem for the Employer. **Id** at 22. Moreover, the same job is performed by his guards twenty-two hours a day when there are no attendants present. **Id**. at 23. When there were no attendants, his guards performed the same job twenty-four hours a day. In fact they performed the same job in those lots where there are no attendants. **Id**. at 24. Clearly, these positions are purely "make work" and, for that reason, do not satisfy the employer's burden of establishing suitable alternate employment, and I so find and conclude.

The Employer has also attempted to discharge its burden of proving suitable alternate employment by producing a labor market survey conducted by Arthur Stevens. Mr. Stevens is not a certified vocational counselor. **Deposition at page 31**. Indeed he was certified as a career development facilitator less than a year before the hearing. **Id**. Moreover, many of the jobs listed in his survey were from his database which was compiled without regard to consideration of Claimant's limitations. **Id**. at 33. Although he received his assignment to conduct a labor market survey in January 2000, he had made some of the employer contacts as far as back as September 1999, apparently related to other litigation. **Id**. at 32. Similarly, the Maine Job Service listings contained in his survey are also the product of his data bank of jobs. **Id**. at 41. The direct employer contacts made subsequent to his receipt of his assignment were made either by himself or his associate, however, he cannot recall which calls he made directly. **Id**. at 34-35. Therefore he could not testify from personal knowledge as to the suitability to any of these jobs. His testimony, in effect, represents two degrees of hearsay. Finally, all that he could testify to was that the jobs he identified with arrows "might be appropriate for him [the claimant] to apply for." **Id**. at 39. Thus, he could not testify as to the existence of realistically available jobs that claimant is capable of performing.

Similar deficiencies in another Labor Market Survey led this Judge to reject the labor market evidence of this Employer in the **Campbell** case cited above. For the same reasons, this Court rejects the labor market evidence produced by Mr. Stevens. Absent that evidence, the Employer has failed to demonstrate the availability of suitable alternate employment and, thus, claimant is found to be entitled to permanent and total disability benefits, and I so find and conclude. For the reasons set forth in Claimant's post-Hearing Brief at pages 16 and 17, which I now adopt, I find and conclude the Employer's evidence is insufficient, as a matter of law, to discharge its burden and, on that basis, find Claimant entitled to permanent total disability benefits from September 7, 1991 to the present and continuing.

Alternatively, if reviewing authorities should conclude that the Employer has discharged its burden of demonstrating suitable alternate employment from March 17, 2000, then the burden shifts to Claimant to demonstrate reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunity shown by the Employer to be reasonably attainable and available and must establish his willingness to work and that such work is within his restrictions. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 14 BRBS 156, 165 (5th Cir. 1981), **rev'g** 5 BRBS 418 (1977).

The record reflects that Claimant was born on May 4, 1949 and is currently 53 years old. He completed three (3) years of high school and, later, obtained his high school diploma by attending night school. However, he continues to have significant difficulties reading and comprehending and has been diagnosed as having a borderline intellectual ability. (CX 6) His prior employment includes working in a papermill as a forklift operator and for a tire company. He has rough carpentry and auto body repair skills and has received training in motorcycle and small engine repair, carpentry and boiler operation. He was hired by the Employer to work as a shipfitter in 1974. When he was placed out of work by the Employer in September of 1991, he enrolled in and completed a course in small engine repair. He then attempted, without success, to find work in that field. (TR 56, 57; EX 4 at pages 3, 14-15)

As I have already found Claimant entitled to total disability benefits through March 17, 2000, the period thereafter is the only time relevant to Claimant's burden to establish reasonable diligence and willingness to work. In that regard when the Employer contacted him in July 1999 to return to work, Claimant returned to work, without hesitation at the job that Employer made available to him. Moreover, even while performing the parking lot attendant position, he undertook a work search in the summer and fall of 2000. (CX 23; TR 57-58, 89) All the employers at which he inquired at were actually hiring. He completed applications at each

prospective employer, but received no positive response or job offer. Claimant submits that he has discharged his burden of demonstrating his diligence and willingness to work and, notwithstanding his efforts, has been unable to find suitable alternate employment.

Accordingly, in view of the foregoing, I find and conclude that Claimant has discharged his burden of demonstrating entitlement to total disability benefits from March 17, 2000 to the present and continuing as he has made a good faith effort to return to work.

Responsible Employer

The Employer as a self-insurer is the party responsible for payment of all of the benefits awards herein under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli or injury as a result of a traumatic event. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

I agree with Liberty Mutual that the Employer as a self-insurer is responsible for all of the benefits awarded herein as Claimant’s total disability is due to the cumulative effect of his multiple injuries at the shipyard, culminating in his December 3, 1990 injury, at which time the Employer was a self-insurer under the Act.

Attorney’s Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer as

a self-insurer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred while this matter was pending before this Court. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on September 7, 1991, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $504.40, such compensation to be computed in accordance with Section 8(a) of the Act.

2. The Employer shall receive credit for compensation previously paid to the Claimant as a result of his December 3, 1990 injury on and after September 7, 1991.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred between May 14, 2002 and the date of this decision. Counsel shall also resubmit his previously filed fee petition.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:dr